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No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TINO FIUMARA,

Petitioner,

v.

JERRY A. O'BRIEN
WARDEN, U.S.P. LEAVENWORTH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

1.

Does a federal prisoner have a protected liberty interest in parole, such as to assure that the Parole Commission predicates its parole decision on evidence that is more substantial than uncorroborated compound hearsay alone.

2.

Is a Parole Commission decision denying parole, which is based on a finding that the prisoner's offense behavior involved murder, arbitrary, capricious, constitutionally defective where there is no rational nexus between the murders and the offenses for which he seeks parole.

3.

Should not the federal courts exercise its supervisory and jurisdictional powers to compel the Parole Commission to follow the statutory requirement of 18 U.S.C. Sec. 4206(b), that: "If parole is denied such notice shall state with particularity the reasons for such denial."

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, Tino Fiumara, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on November 6, 1989, affirming the district court judgment of September 12, 1988.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit, affirming the judgment of the district court that denied the petitioner's petition for writ of habeas corpus, directed against the action of the United States Parole Commission denying his parole, was entered on November 6, 1989 and is reported at 889 F. 2d 254 (10th Cir. 1989). The decision of the United States District Court for the District of Kansas, denying the petition for writ of habeas corpus was entered on September 12, 1988, and is not reported. The said decisions of the Circuit Court and the district court appear in the Appendix to this Petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered and filed on November 6, 1989. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed by petitioner; and said Petition was denied by an Order of the Court of Appeals entered and filed on January 25, 1990.

This Petition for Writ of Certiorari was served and filed within ninety (90) days of January 25, 1990. The statutory provision believe to confer jurisdiction of this court to review the final judgment of the United States Court of Appeals for the Tenth Circuit by writ of certiorari is 28 U.S.C. Sec. 2102(c).

STATUTORY PROVISIONS

The statutory provisions, regulations and rules are set out in the Appendix hereto.

STATEMENT OF THE CASE

The petitioner is a federal prisoner, serving a combination of sentences, amounting to a term of 25 years, 8 months and 17 days. He has been incarcerated since June 20, 1979. His sentences arose out of convictions in two cases: one, in the United States District Court for New Jersey for extortion and conspiracy to commit extortion that occurred in 1977; and, the other in the United States District Court for the Southern District of New York for violations (from 1971 through 1979) of the Hobbs Act, the Taft-Hartley Act, for RICO substantive and conspiracy charges and income tax violations.

In the pre-sentence proceedings in the New Jersey case, the United States Attorney wrote a letter to the Probation Department, which, in part, made allegations against the defendants.[1] As to Fiumara, two of them were:

> 1. On or about October 14, 1967, at the 309 Club, located at 309 Lafayette Street, Newark, New Jersey, the defendant Tino Fiumara murdered Peter Mantello, also known as "Flatnose Pete", Patsy Collucci and Nicholas Collucci by shooting them to death.
>
> 2. Between on or about January 1, 1969, and March 1969, at the City of Paterson, New Jersey, the defendant Tino Fiumara and others murdered Robert Harris by beating and shooting him.

The defendants disputed the allegations and a lengthy, eleven day, hearing was held before the sentencing judge.[2]

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[1] See, 18 U.S.C. Sec. 3577 (re-numbered 3661, effective November 1, 1986)

[2] *United States v. Fatico*, 579 F. 2d 707 (2d Cir. 1978), *on remand*, 458 F. Supp. 388 (E.D.N.Y.), *aff'd.* 603 F. 2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1986).

At its conclusion, the trial judge commented that: 1) the defendant was not tried for homicide; 2) the court would not sentence the defendant for homicide; and 3) the function of the *Fatico* hearing was not to find the defendant "guilty" or "not guilty" of uncharged murders.[3]

The petitioner's initial parole hearing, 28 C.F.R. Sec. 2.12, was held on June 19, 1984. According to the documents prepared by the hearing panel, under the Parole Commission guidelines, the petitioner's salient factor score was "10" ("very good") and the severity rating for his offense behavior was Category Five. These factors provide a parole prognosis for release between 24 and 36 months. However, under the law, he was required to serve at least one-third of the sentence, 103 months, to January 11, 1988, before parole. 18 U.S.C. Sec. 4205(a).

After the hearing the panel, in its summary, noted: the seriousness of the offenses for which the petitioner had been convicted; the allegations concerning the murders and his participation at a high level in organized crime. But since there was insufficient file information regarding the allegations to make a finding, it was determined the case should be referred to the Regional Commission for original jurisdiction determination. 28 C.F.R. Sec. 2.17(b). Based on the information on hand, it was the panel's recommendation that the petitioner be released after service of 103 months, his parole eligibility date.

The Regional Commissioner declined to accept the panel's recommendation for presumptive parole after service of 103 months and took steps to supplement the file information. In this regard, the Commissioner received a letter dated August 1, 1984, from Special Attorney Stanley R. Chesler of the Organized Crime and Racketeering Section of the Newark (New Jersey) Strike Force. Enclosed with Chesler's letter were selected pages from the transcript of the *Fatico* sentencing hearing. On the basis of

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[3] Fiumara has never been charged or tried for any of the subject murders.

the Chesler letter, "and other relevant material available in the USPC/BOP file", the petitioner, by Notice of Action, dated August 14, 1984,[4] was scheduled for another hearing.[5] 28 C.F.R. Sec. 2.24(b)(3).

The second hearing was held on December 19, 1984. The hearing panel was of the opinion that the petitioner's offense behavior should be rated at Category Eight based on information which indicated that he was responsible for the murder of four persons. The panel recommended that: 1) the case be referred to the Regional Commission for original jurisdiction consideration; and, 2) the petitioner's confinement be continued to expiration. The Regional Commissioner accepted the recommendation of the panel. Accordingly, pursuant to 28 C.F.R. Sec. 2.17(b), the case was referred to the National Commissioners for consideration.

By Notice of Action dated February 19, 1985, the National Commissioners' ordered that the petitioner "continue to expiration." (App. p. 29a) The reasons for this action were stated as follows:

> "Your offense behavior has been rated as Category Eight severity because it involved murder, extortion and racketeering. Your Salient Factor Score is 10. You have been in federal custody a total of 68 monhts [sic]. Guidelines established by the Commission for adult cases which consider the above factors indicate a range of 100+ months to be served before release for cases with good institutional adjustment and program achievement. After review of all relevant factors and information presented, a decision above the base of the guidelines is warranted because of the aggra-

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[4] App. p. 31a.

[5] The Commission had also received a letter dated August 3, 1984 from W. Hunt Dumont, U.S. Attorney for New Jersey. The fact of the Chesler letter was disclosed to the petitioner in the Notice of Action of August 14, 1984, but the Commission's receipt of the Dumont letter was not revealed to the petitioner until the re-hearing. The substance of the letter was disclosed by one of the members of the hearing panel. (Tr. of December 19, 1984, pp. 16-17.)

> vated nature of your offense behavior; a preponderance of the evidence shows that you were involved in the murder of 4 people. Additionally, you were a principal in an unusually extensive, sophisticated, on-going criminal enterprise controlling and directing the criminal actions of your co-conspirators. By means of extortion, you controlled the New Jersey waterfront. You are also a more serious risk than indicated by your salient factor score as indicated by your long term commitment to a criminal life style." Id., App. pp. 29a-30a

The Commission's reasons as to how the petitioner's offense behavior "involved murder" were not stated. The National Appeals Board affirmed the Commission's decision by Notice of Action dated October 31, 1985.

After failing through administrative channels, to reverse the Commission's decision, the appellant filed a petition for *habeas corpus* relief (28 U.S.C. Sec. 2241) in the United States District Court for The District of Kansas on March 27, 1987.

After responsive pleadings were filed in the suit, the district court entered a judgment (on February 29, 1988) remanding the case to the Commission for a new hearing. The court concluded that "the Parole Commission neither complied with the statutory requirements, *nor was there a rational basis for it's decision.*"[6] (App. p. 23a) (emphasis supplied)

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[6] The Respondent was displeased with the court's statement that ". . .nor was there a rational basis for its [the Commission] decision."; and filed a motion seeking to have the court clarify what it meant. Respondent urged its own interpretation upon the court ("Respondent understands that statement to mean that the Commission did not adequately articulate the specific evidence relied upon to support its finding that petitioner committed murder.") The court never ruled on the motion. However, in its final judgment (App. p. 10a), the court clarified the statement in its remand order and did so in terms that abandoned the observation that there was no rational basis for the commission's decision ("The court remanded the case to the Parole Commission because the Commission failed to specify the factual basis for its decision." Id., at p. 12a)

In accordance with the district court remand order, the Parole Commission held another hearing in the petitioner's case on March 29, 1988. On May 17, 1988, the Commission issued a Notice of Action which left unchanged the decision that the appellant serve to expiration. (App. p. 27a) His offense behavior was again rated at Category Eight. Likewise, the decision above the guidelines remained. These findings were noted as resting upon materials (documents) that the Commission had considered.

> "After review of all relevant factors and information presented, a decision above the guidelines appears warranted because your offense involved the following aggravating factors: You were involved with four murders. The basis for this finding are: (1) Sentencing hearing proceedings criminal #78-319, October 2, 1979, U.S. District Court for the District of New Jersey, pages 1440-1450; (2) Letter of August 1, 1984 by Stanley R. Chesler, Special Attorney, Organized Crime and Racketeering Section, Newark Strike Force; and (3) Letter of August 3, 1984, by W. Hunt Dumont, U.S. Attorney for the District of New Jersey. Newark, New Jersey." (App. p. 27a)

Still no reasons, nor rationale, were provided for the Commission's determination that the appellant's federal offense behavior involved murder. An administrative appeal from the decision failed.[7]

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[7] The National Appeals Board/Full Commission, by Notice of Action dated July 14, 1988 affirmed the previous decision, saying, in response to the petitioner's arguments, that:

> In response to your claim that your offense severity level is incorrectly rated at Category Eight, this claim is without merit. Your offense behavior has been rated at Category Eight because it involved murder.
>
> In response to your claim that a decision outside the guidelines is not supported by the reasons or facts as stated on the Notice of Action, the factual basis given for the above guideline decision warrants the decision for the reasons stated. The reasons given are specific and comply with 28 C.F.R. sec. 2.20 for decisions

On September 12, 1988, the district court issued a Memorandum and Order denying the petition. (App. p. 10a)

The petitioner appealed the judgment of the district court to the United States Court of Appeals for the Tenth Circuit.[8]

On November 6, 1989, the Circuit Court entered its judgment. In a written opinion, the Court affirmed the judgment of the district court. *Fiumara v. O'Brien*, 889 F. 2d 254 (10th Cir. 1989) (App. p. 1a) In the opinion, the court dismissed the appellant's arguments with the observation that the Commission and the district court had found "a nexus [between the murders and the federal offenses] from a review of the three evidentiary sources" referenced in the Notice of Action of May 17, 1988. 889 F. 2d at 258 The Circuit Court further noted that: "Indeed, after reviewing these materials, the district court specifically cited the 'connection between the murders and the racketeering charges as a basis for denying Fiumara's writ." Id. Finally, the court said:

> "After careful review of these documents, our analysis confirms that there was no abuse of discretion by the Parole Commission in finding Tino Fiumara responsible, although unconvicted, for four murders. *There was sufficient evidence to show that Fiumara was feared because of his violent and ruthless nature, thus providing the nexus between the unconvicted murders and his Hobbs Act and RICO offenses.* The Parole Commission did not abuse its discretion in using the murders to increase Fiumara's offense severity rating from Category Five to Category Eight." Id. (footnote omitted) (emphasis supplied)

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outside the guidelines.

. . .

(App. p. 27a)

[8] The jurisdiction of the Circuit Court rested on 28 U.S.C. Sec. 1291 and Rule 4(a) of the Fed.R.App.P.

A timely petition for rehearing was filed by the petitioner. Fiumara's principal argument for rehearing of the appeal was that the court of appeals (in the part of the opinion emphasized above) impermissibly offered a theory of nexus between the murders and his offense behavior—which it had no authority to do. It was Fiumara's contention that: the Congress, in 18 U.S.C. Sec. 4206, required the Commission, and only the Commission, to state the reasons for the denial of parole; and, that the Commission had failed in its statutory duty to do so. This petition was denied on January 25, 1990. (App. p. 33a)

REASONS FOR GRANTING THE WRIT

In denying the petitioner parole, the Commission failed to follow the statutory requirements to provide the petitioner with a particularized statement of the reasons for the denial. 18 U.S.C. Sec. 4206. The petitioner urged this point in the courts below as a ground for the grant of habeas relief. Despite the clear statutory violation, neither court compelled the Commission to follow the statute. Indeed, the Circuit Court in its review of this claim, found and stated a reason for the Commission's action—a reason not provided by the Commission, but which was argued to the court by the Commission's counsel.

The decision of the Tenth Circuit in this case, affirming the actions of the Parole Commission, should be reviewed because: 1) the Court's refusal to invalidate the Commission's finding that the petitioner was involved in murder where the finding was not supported by substantial evidence—a requirement of the applicable evidentiary standard—sanctioned a violation of the petitioner's constitutional right to procedural due process; 2) assuming the Commission's finding that the petitioner was involved in murder was free of constitutional and procedural error, because there was no logical nexus between the murders and the offenses for which the petitioner had been convicted and was seeking parole, the use of the finding by the Commission to elevate the petitioner's offense severity rating and as a basis to deny him parole were separate violations

of the petitioner's due process right that the court failed to redress; 3) the court failed to enforce the statutory requirement that the Commission provide the petitioner with a particularized statement of the reasons for the denial of parole; and, instead, impermissibly adopted a reason for the Commission's action that the Commission had not stated, but was argued to the court by the Commission's counsel.

The predicate for the constitutional issues raised in this case in (1) and (2), above, is that the federal parole statute, 18 U.S.C. secs. 4201, *et seq.* creates an expectancy of parole for inmates that is protected by the Due Process Clause of the Fifth Amendment. The several federal Circuits that have considered the question of whether federal inmates have a protectable Fifth Amendment right to parole have reached conflicting results, with three Circuits expressly holding that the statute does create such a right under the standards set forth in *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 9-12 (1979) and one Circuit holding otherwise. This court has not yet spoken to the issue. The present case allows the opportunity for the court to put this important, long standing question to rest.

Though this court has ruled in other contexts that an administrative agency must follow statutory requirements exclusively related to the agency's functioning; and that the courts have no authority to substitute its own discretion for that of the agency (*Security and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196 (1943); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-169 (1962); *Industrial Union v. American Petroleum*, 448 U.S. 607, 631, n. 31 (1980)), the action of the Circuit Court in this case, in providing a reason for the denial of the petitioner's parole, departed from this well settled principle.

ARGUMENT I

The Finding That The Petitioner Was Involved In Murder, Which Was Used To Fix His Severity Rating At Category 8 And As A Basis To Deny Him Parole, Was Not Supported By Substantial Evidence; And Thereby Violated The Petitioner's Procedural Due Process Rights

An analysis of the framework, by which the Commission reached the decision to deny the petitioner parole, requires, first, an examination of the threshold finding that the petitioner was involved with four murders. The standard adopted by the Commission to resolve factual disputes is set out at 28 C.F.R. Sec. 2.19(c).[9] Ultimately, the Commission stated in its Notice of Action of May 17, 1988, that the basis for the finding rested upon: 1) pages 1440-1450 of the transcript of the District Court of New Jersey sentencing proceedings; 2) the August 1, 1984 letter of Stanley R. Chesler; and 3) the August 3, 1984 letter of W. Hunt Dumont.

Each of the three documents contained, only the statements of persons repeating the hearsay of others, with no reference to the factual sources of the information. Nor, did the documents contain any underlying facts to support the hearsay.[10] No witnesses to the murders were ever

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[9] 28 C.F.R. Sec. 2.19(c) provides in part, as follows:

> The Commission may take into account any substantial information available to it in establishing the prisoner's offense severity rating, salient factor score, and any aggravating or mitigating circumstances, provided the prisoner is apprised of the information and afforded an opportunity to respond. If the prisoner disputes the accuracy of the information presented, the Commission shall resolve such dispute by the preponderance of the evidence standard; that is, the Commission shall rely upon such information only to the extent that it represents the explanation of the facts that best accords with reason and probability.
>
> . . .

[10] The Chesler letter transmitted excerpts of the sentencing transcripts, with the writer's comments and characterizations of the meaning of those portions. Also enclosed was a transcript of a conversation

found, nor was there any physical or scientific evidence pointing to the identity of the perpetrators. However, there was an abundance of rumor and beliefs that the petitioner was involved in the triple homicide of October 14, 1967—all of which permeated the three documents considered by the Commission. A mass of compounded hearsay was the "evidence" accumulated in the documents.

The petitioner's consistent position in the courts below has been that the uncorroborated hearsay in these documents, standing alone, did not establish his involvement in the murders by the preponderance of the evidence standard, 28 C.F.R. Sec. 2.19(c).[11]

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between two persons, William Montella and James Randolph, on January 26, 1975, that was electronically intercepted under court order. None of the speakers nor declarants had any personal knowledge about the murders. The information in the materials fell into two categories: 1) witnesses who related what some other person or persons said or intimated to the effect that the petitioner was involved in the murders (Lt. Coe, Tr. pp. 237, 248; Patrick Kelly, Tr. pp. 1441-1450); 2) recorded conversations, in which the speaker, not a witness in any proceeding, stated that the petitioner was involved in the triple murder, with no indication as to the source of the information (Joseph Licata and William Montella).

The transcript of the testimony of Patrick Kelly at the sentencing hearing (pp. 1441-1450) was one of the three documents identified by the Commission as the basis for its finding. In his testimony, Kelly related his conversation with a person named Dominic DiNorscio who in effect said that the petitioner was obligated to him because his son and others had saved the petitioner's life when some other person who was associated with the three men had been killed in the bar, believed that Fiumara was involved in their deaths.

The Dumont letter was never fully disclosed to the petitioner. See ft. n. 6, supra. At the hearing of December 19, 1984, one of the examiners summarized the contents of the letter. The examiner said that the letter noted that: "Evidence presented during a hearing following the New Jersey conviction also disclosed that he had been responsible for the murders of at least four people." Tr. p. 16 The letter itself was withheld from the petitioner under the authority of 18 U.S.C. Sec. 4208(c). However, it was submitted to the District Court and the Circuit Court *in camera*.

[11] Supra, ft. n. 9.

As presented here, the question is whether a federal paroling decision that rests solely on naked, uncorroborated hearsay satisfies due process under the preponderance of the evidence standard. Implicit in this question, of course, is whether a federal prisoner has a protected liberty interest in parole, such as to permit a review of his evidentiary challenge.

This court has not yet decided whether federal prisoners have a liberty interest in parole release that is protected under the due process clause of the Fifth Amendment. Whether such a right exists is crucial to the determination of the issue raised herein regarding the Commission's finding that the petitioner was involved in four murders. Though the due process issue is not decisive to petitioner's other points, their resolution is, however, affected by the due process analysis.

Previously, this court decided that the language and structure of the Nebraska Parole statute does provide a mechanism for parole that is entitled to some due process protection. *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1978). Thereafter, the court reached the same result regarding the Montana Parole statute. *Board of Pardons v. Allen*, 482 U.S. 369 (1987). In both cases, the court held that: 1) the presence of a parole system by itself does not give rise to a constitutionally protected liberty interest in parole release; and 2) whether a statute did create an "expectation of parole" protected by the Due Process Clause requires scrutiny of the statute under the standards set forth in *Greenholtz*. Of controlling significance, under the *Greenholtz* test, is whether the statute under review, uses mandatory language ("shall") to create a presumption that parole release shall be granted when the findings designated under the statute are made. *Greenholtz*, 442 U.S., at 12; *Board of Pardons*, 482 U.S., at 377-378.

The several circuits that have considered whether the federal parole statute creates a liberty interest deserving of due process protection are split on the question, with the majority holding that it does. The Ninth Circuit having

reached that conclusion in *Bowles v. Tennant*, 613 F. 2d 776, 778 (9th Cir. 1980), which the court reiterated in *Reynolds v. McCall*, 701 F. 2d 810, 812 (9th Cir. 1983) and in *Roberts v. Corrothers*, 812 F. 2d 1173, 1179 (9th Cir. 1987). The Eighth Circuit has held that the Federal Parole Act creates "a substantial expectation of parole", without saying "what process is due in connection with the federal parole process." *Evans v. Dillahunty*, 662 F. 2d 522, 526 (8th Cir. 1981). The Seventh Circuit has held that the Federal Parole Act creates the same liberty interest as does the Nebraska statute. *Solomon v. Elsea*, 676 F. 2d 282, 284-85 (7th Cir. 1982). The Fifth Circuit has ruled differently: *Page v. United States Parole Commission*, 651 F. 2d 1083, 1086 (5th Cir. 1981) ("[A] parole release decision does not invoke the protection of due process since the denial of parole does not amount to a loss of liberty"). Also, see *Brown v. Lundgren*, 528 F. 2d 1050, 1053 (5th Cir.); cert. denied, 429 U.S. 917 (1976); *Stroud v. United States Parole Commission*, 668 F. 2d 843, 847 (5th Cir. 1982).

The conclusion reached by the Seventh, Eighth and Ninth Circuits, as noted above, that the federal parole statute does create an inmate expectancy of parole worthy of due process protection, is indeed the correct interpretation of the statute, the opinion of those courts, resting as they do, upon this court's reasoning in *Greenholtz* and *Board of Parole v. Allen*. From the premise articulated in these Circuit court cases, the inquiry in this case turns to: whether the finding of the Parole Commission that the petitioner was involved in four murders—a finding that resulted in the denial of parole to the petitioner—satisfied due process under the preponderance of the evidence standard where the evidence to prove the finding consisted solely of uncorroborated hearsay.

The preponderance of the evidence standard establishes a measure of the procedural due process that is due an inmate in the Commission's decision-making function.[12]

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[12] The preponderance rule, applicable to federal parole fact finding,

With rare exceptions, the federal lower courts seldom give meaningful review to the claims of federal prisoners about the lack of evidence or the insubstantial nature of the evidence upon which the Commission bases its fact-finding. Generally, the position of the courts respecting these issues, is that they are "beyond the scope of its power to review."[13]

The issue in this case is whether the finding that the petitioner was involved in murder that rests solely upon unsubstantiated hearsay, and resulted in the decision to deny his parole, satisfies the requirements of due process under the standards of 28 C.F.R. Sec. 2.19(c). Though worded differently, Sec. 2.19(c) is identical in meaning and in its effect to the principal provision about evidence found in the Administrative Procedure Act, 5 U.S.C. Sec. 556(d).[14] Professor Davis' comments about the APA provision is likewise applicable to Sec. 2.19(c):

> The statement that "Any . . . evidence may be received" means that admission of evidence cannot be error. Problems of admissibility are gone, except that of course good sense requires exclusion of irrelevant, immaterial, and unduly repetitious evidence. Admission of hearsay cannot be error. The only questions are what evidence to rely upon, and the main problem is whether or not hearsay alone may support a finding. The crucial question is: May hearsay be "reliable, probative, and substantial?"

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gives federal inmates greater procedural protection than that available to Massachusetts state prisoners in disciplinary hearings that may result in revocation of good time credits. *Superintendent v. Hill*, 472 U.S. 445, 455 (1985) ("We hold that the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits.")

[13] *Bush v. Kerr*, 554 F. Supp. 726, 731-32 (D.C. Wisc. 1982)

[14] "Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence."

K.C. Davis, Administrative Law Text
3rd Edition (1972) p. 276

The evidentiary/due process issue in this case is narrow and comprehends the Commission's "whole record." "[T]he substantial evidence test is quintessentially a case-by-case analysis requiring review of the whole record." *Calhoun v. Bailar*, 626 F. 2d 145 at 148 (9th Cir. 1980), cert. denied, 452 U.S. 906 (1981). The evidence before the Commission consisted only of uncorroborated hearsay or rumors and cannot, consistent with due process requirements, support the finding.[15]

"The term 'substantial evidence' has been interpreted to mean 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)" *Hoska v. United States Department of the Army*, 677 F. 2d 131, at 135. (D.C. Cir. 1982) The term 'substantial evidence' and its meaning parallels the section 2.19(c) explanation of the preponderance of the evidence standard ("the Commission shall rely upon such information only to the extent that it represents the explanation of the facts that best accords with reason and probability.").

The materials considered by the Commission in the present case on the matter of the petitioner's alleged involvement in murder did not meet the substantial evidence test. And, this is so, not solely because it was hearsay, for, it is possible in the administrative proceedings context for hearsay to have probative value under certain circumstances. *Richardson v. Perales*, supra 402 U.S. at 402; *Jacobowitz v. United States*, 424 F. 2d 555, 561 (Ct. Cl. 1970). In the petitioner's case, however, the hearsay was uncor-

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[15] In *Steadman v. Securities and Exchange Commission*, 450 U.S. 91 (1981), it was held that Sec. 556(d) establishes a preponderance of the evidence standard. Id. at pp. 100-102. ("Congress was primarily concerned with the elimination of agency decision-making premised on evidence which was of poor quality—irrelevant, immaterial, unreliable, and non-probative—and of insufficient quantity—less than a preponderance." Id. at 102)

roborated and stood alone. " '[S]ubstantial evidence' includes more than 'uncorroborated hearsay' and 'more than a mere scintilla', the findings, to be valid, cannot be based upon hearsay alone, nor upon hearsay corroborated by a mere scintilla." *Willapoint Oysters v. Ewing*, 174 F. 2d 676, 691 (9th Cir.), cert. denied, 338 U.S. 860 (1949). From a review of the leading cases, including *Perales*, supra, the Ninth Circuit in *Calhoun v. Bailar*, supra listed the factors that may be helpful in the substantial evidence analysis as related to hearsay declarations: hearsay may constitute substantial evidence depending upon its probative value and realiability, considering, *inter alia*, possible bias of the declarant, whether statements are signed and sworn to, whether they are contradicted by direct testimony, whether the declarant is available, "and finally, whether or not the hearsay is corroborated." 626 F. 2d at 149.

The hearsay considered by the Commission, here, fails substantial evidence testing. The bias of the declarants was unknown, the statements that implicated the petitioner were all unsworn, oral and anonymous, and uncorroborated.

ARGUMENT II.

The Commission's Use Of The Finding That The Petitioner Was Involved In Murder To Elevate His Offense Severity Rating And To Deny Him Parole Violated His Due Process Rights Because There Was No Rational Nexus Between The Murders and His Offense Behavior

Even if the finding that petitioner's evidentiary challenge is precluded review, the Commission's use of the finding to elevate the petitioner's offense severity rating violated his due process rights.

The reason given by the Commission for setting the petitioner's offense severity rating at Category Eight was

the finding that his offense behavior involved murder.[16] The Category Eight rating placed the petitioner at a level, where under the guidelines, the denial of parole was more manifest than at a lower classification. In a direct way, the Category Eight rating resulted in the Commission's decision to deny parole in the petitioner's case. The finding that his offense behavior "involved murder" and was thereby rated at Category Eight is arbitrary, irrational, and violates the petitioner's due process rights, because there was no nexus between the murders and the petitioner's offense behavior.

Neither the parole statute, nor the enabling C.F.R. provisions guides the Commission in its offense severity determinations. There is, however, ample case law on the subject; and section (2.20-04) in the Commission's Rules and Procedure Manual (Nov. 4, 1985), instructs about the "Offense Severity Rating":

> "In applying the guidelines, the offense severity rating shall reflect the overall circumstances of the present offense behavior. Select the offense rating appropriate to the actual offense behavior that occurred."[17]

Clearly, the severity rating attempts an assessment of the offense(s) for which the inmate is seeking parole.

The decided cases that have described the offense severity rating are all in agreement that the "terms 'offense' and 'offense behavior' refer to the conduct for which the prisoner is currently serving his sentence." *Schiselman v. United States Parole Commission*, 858 F. 2d 1232, 1234, n. 4 (7th Cir. 1988). Accord, *Wallace v. Christensen*, 802 F. 2d 1539, 1540-1541 (9th Cir. 1986); *Walker v. United*

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[16] Whether considerations other than murder were used to fix the petitioner's offense severity rating at Category Eight is inconsequential, it need only be shown that murder was a factor. *Monk v. United States Parole Commission*, 463 F. Supp. 859, 863, n. 18 (M.D. Pa. 1978)

[17] The Commission's Guideline Application Manual (July 25, 1978) at Part III ("offense severity rating") contains the same language.

States, 816 F. 2d 1313 (9th Cir. 1987); *Silberberg v. United States Parole Commission*, 483 F. Supp. 1280, 1283 (M.D. Pa. 1980); *Monk v. United States Parole Commission*, supra, 463 F. Supp. at 861, n. 9 (M.D. Pa. 1978)[18]

There simply is no rational nexus between the murders and the offense for which the petitioner was convicted and seeks parole. The murders were committed years before the crimes in the New Jersey and New York cases. The murders were not related, or connected, to those crimes in any way.[19] Accordingly, the use of the murders in calculating the petitioner's offense severity rating was illogical and irrational. The petitioner has made this argument through the proceedings before the Commission and in the Courts below. The response by the District Court was that:

> "When making parole determinations, the Commission 'may take into account any substantial information available to it in establishing offense severity.' [quoting 28 C.F.R. Sec. 2.19(c)] Recommendations and information from prosecutors and other interested parties are reviewable by the Commission in making such determinations. *See*, 28 C.F.R. Sec. 2.20(d). Further, the Commission is not limited to the consideration of formally adjudicated crimes . . . , nor are they bound by the district judge's decision not to consider the murder evidence when sentencing."[20]

The Circuit Court opinion mirrored this reasoning.[21]

The rationale of these courts totally missed the thrust of the petitioner's argument. The petitioner never ques-

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[18] See also, *Lieberman v. Gunnell*, 720 F. 2d 75, 76 (2nd Cir. 1984); *Priori v. Nelson*, 626 F. 2d 211, 215 (2nd Cir. 1980).

[19] "A state offense may be used to establish a prisoner's offense-severity rating if the state offense is sufficiently related to the federal offense in time or nature" *Maddox v. United States Parole Commission*, 821 F. 2d 997, 1000 (5th Cir. 1987) (citing in ft. n. 28 C.F.R. sec. 2.20 (Offense Severity Index, Chapter Thirteen, Subchapter A, General Note 7) (1986)).

[20] App. p. 13a (citations omitted)

[21] 889 F. 2d at 257-58.

tioned, and does not now question, the correctness of the principle, asserted by the courts below: that case and statutory law authorizes the Commission to consider a wide range of information, from innumerable sources, including unadjudicated offenses, in determining a prisoner's offense severity. This principle, however, is irrelevant and unresponsive to petitioner's contention. It fails to address the argument that all the information the Commission *may consider* when determining offense severity ratings, can not in every case, and certainly not in this one, be *relied upon* to fix the rating. Otherwise, there would be no protection to an inmate's rights against decisions based on impermissible considerations. See, *Block v. Potter*, 631 F. 2d 233, 237-240 (3rd Cir. 1980).

28 C.F.R. Sec. 2.19(c), supra, ft. n. 9, makes this distinction. It speaks, on the one hand, of information that the Commission "may take into account"; and, on the other hand, speaks of the information that the Commission "is entitled to rely upon", in terms that make it obvious that they are not identical.[22]

That there must be a rational nexus between the murders and the offenses for which the petitioner seeks parole is an obvious, commonsense requirement, that has escaped application in this case. The proper inquiry is whether, from the record, there appears or is shown, some logical and rational relationship between the murders and the offense for which the petitioner seeks parole. Significantly, the record before the Commission was barren of any suggestion of a motive for the murders. It is not sufficient to find, as the Commission did, that the petitioner participated in the murders and then leap to the conclusion that his later offense behavior involved the murders. The cir-

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[22] It is to be further noted that the Commission's Rules and Procedures Manual, sec. 2.20-04, supra, that instructs about the Offense Severity Rating says that "[t]he information in the file describing circumstances more severe than reflected by the offense of conviction . . . *may be relied upon* to select an appropriately higher severity rating *only if* such information meets the standard indicated in 28 C.F.R. 2.19(c)." (Emphasis supplied)

cumstances of this case, as well as the concept of offense severity rating, demands a concrete showing of a rational nexus between the murders and his offense behavior.

Without the limitations imposed by the rational nexus requirement, the Commission, as in this case, would have free reign to make offense severity decisions arbitrarily, capriciously, and in disregard of due process rights. *Little v. Hadden*, 504 F. Supp. 558 (D. Colo. 1980)

ARGUMENT III.

The Parole Commission Failed, As Required By 18 U.S.C. Secs. 4206(b) & (c), To State With Particularity The Reason For Denying The Petitioner Parole. The Circuit Court Did Not Enforce This Requirement And Instead Furnished A Rationale For The Commission's Action.

Having determined that the petitioner's offense severity rating was Category Eight, the Commission proceeded to deny him parole, ordering that he serve his lengthy sentence to its expiration. With a Category Eight rating, the guidelines called for the petitioner to serve 100+ months. The Notice of Action of May 17, 1988[23], was the Commission's latest classification of the petitioner's offense severity rating at Category Eight and that he was to continue to expiration. It further advised , in part, that: "After review of all relevant factors and information presented, a decision above the guidelines appears warranted because your offense involved the following aggravating factors: (1) You were involved with four murders . . . " The Notice of Action was worded in the language of 18 U.S.C. Sec. 4206(c).[24] This provision authorizes the Commission to deny release on parole notwithstanding the guidelines if it determines there is "good cause" for so doing; "*provided*", however, "The prisoner is furnished written notice stating with particularity the reasons for its determination . . . " The petitioner here seeks review of the failure of the Com-

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[23] App. p. 27a.

[24] 18 U.S.C. Sec. 4206(c) is set out in full at App. p. 36a.

mission to "state with particularity" the reasons for its determination to deny him release on parole, insofar as it was based on the claim that his offense involved murder.[25] The statute, 18 U.S.C. sec. 4206 at subsections (b) and (c) expressly requires that this be done;[26] and the courts below have not enforced this requirement.

Section 18 U.S.C. sec. 4206(a) creates a constitutional liberty interest, *Solomon v. Elsea*, supra, 676 F. 2d at 284-285. The failure of the Commission to provide the petitioner with a sufficient notice of the ground justifying his parole denial, is not only statutorily deficient but constitutionally so, as well. Id. In a later Seventh Circuit case, *Kramer v. Jenkins*, 801 F. 2d 896 (7th Cir. 1986), the court explained the due process implications, derived from *Solomon*, as related to the need that the Commission state reasons for its actions:

> We held in *Solomon*, 676 F. 2d at 290, that the Commission's decisions must have a "factual basis". This

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[25] Some reported cases have taken the position that since the guidelines set no outer limit of time for Category Eight prisoners to serve before parole, the denial of parole to such prisoners cannot be construed to be "notwithstanding the guidelines,"; and that therefore, the requirements of 4206(c) for a "good cause" determination to deny parole and for a written notice stating with particularity the reasons for the determination, need not be met. *Hackett v. United States Parole Commission*, 851 F. 2d 127, 131 (6th Cir. 1987); *Beltempo v. Hadden*, 815 F. 2d 873, 876 (2nd Cir. 1987); *Kele v. United States Parole Commission*, 775 F. 2d 243, 245 (8th Cir. 1985); *Lynch v. United States Parole Commission*, 768 F. 2d 481, 486-487 (2nd Cir. 1985); *Robinson v. Hadden*, 723 F. 2d 59, 63 (10th Cir. 1983); *Hodges v. O'Brien*, 589 F. Supp. 1225, 1231 (D. Kan. 1984); *Bush v. Kerr*, 554 F. Supp. 726, 730 (W.D. Wisc. 1982) Instead, under the cases expressing this view, the denial of parole to a Category Eight prisoner only need meet the requirement of 18 U.S.C. 4206(b): "If parole is denied such notice shall state with particularity the reason for such denial." Insofar as the issue presented here about the lack of a statement of particularity of reasons for the denial of parole, the requirements of 4206(b) & (c) are identical. This being so, the petitioner will here make his contention about the failure to provide a particularized statement of reasons as simply a breach of sec. 4206.

[26] Id.

> followed from our conclusion that the parole statutes and regulations give federal prisoners a "liberty or property" interest in parole, within the meaning of the due process clause of the fifth amendment. Once statutes and rules give prisoners such an interest, the due process clause requires the government to have some reason for depriving the prisoner of his interest. 803 F. 2d, at 900-901

Solomon v. Elsea, supra, is also regarded as one of the leading cases discussing the statement of reasons issue. The *Solomon* court set forth a standard for the statement of reasons requirement that has been followed by other courts faced with this problem:

> To satisfy minimum due process requirements a statement of reasons should be sufficient to enable a reviewing body to determine whether parole has been denied for an impermissible reason or for no reason at all. For this essential purpose, detailed findings of fact are not required, provided the [Commission's] decision is based upon consideration of all relevant factors and it furnishes to the inmate both the grounds for the decision . . . and the essential facts upon which the [Commission's] inferences are based.

676 F. 2d at 286 (citations omitted). The *Solomon* standard, comports with the legislative intent of 18 U.S.C. sec. 4206.[27]

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[27] "If a prisoner who has not served the minimum period recommended by the guidelines is denied parole, he should receive a statement containing his severity of offense rating, the calculation of his salient factors score and an explanation of how such a determination utilizing the guidelines was reached. On the other hand, if a prisoner who has served the time required to be eligible for parole under the guidelines is denied parole and this denial results in delaying his release beyond the time period recommended by the guidelines, he should receive not only the above information but also a specific explanation of the factors which caused the Commission to reach a determination outside the guidelines. S. Rep. No. 94-369, 94th Cong., 2d Sess. (1976), reprinted in [1976] U.S. Code Cong. & Admin. News, 346.

The key reason for denying the petitioner parole was because the Commission determined that, his offense involved the aggravating factor of murder. On the facts of the petitioner's case, it was not apparent that the crimes of which he had been convicted and was seeking parole, namely extortion, conspiracy, RICO, Hobbs Act and tax offenses, involved murders that were committed several years before those crimes. If,indeed, there were some basis or reason, reached by the Commission that there was a relationship or nexus between the murders and the later crimes, 18 U.S.C. sec. 4206 required that the Commission state those reasons with particularity. The statement of reasons requirement is mandatory.

On the facts of the petitioner's case, there was no apparent rational nexus between the crimes of which he had been convicted and was seeking parole, or was aggravated by the murders. Certainly, the killings did not in any sense occur in connection with the petitioner's offense behavior. There is no explanation by the Commission of " 'why' petitioner's specific criminal actions justify denial of parole." *Hearn v. Nelson*, supra, 496 F. Supp. at 1116. The major problem with the Commission's determination that the petitioner's offense behavior involved murder or was aggravated by the factor that it involved murder, "is that there is no basis in the record for the principal rationale of the decision." *Little v. Hadden*, 504 F. Supp. 558 at 563 (D. Colo. 1980).

Simply put, there was no factual basis for the finding that the petitioner's offense behavior involved murder, or was aggravated by the murders' and, more critically, the Commission failed to state any such reasons in its Notice of Action. A statement, such as the one here, that advises the prisoner that a decision has been made to deny him parole because his offense involved the aggravating factor of his involvement with four murders, without more, is "insufficient to usefully inform the petitioner of the reasons for the denial of his parole application." *Stassi v. Hogan*, 395 F. Supp. 141, at 145 (W.D. Ga 1975).

The most thorough analysis of the statutory statement of reasons requirement is found in the case of *Marshall v. Lansing*, 839 F. 2d 933 (3rd Cir. 1988). There, the district court had granted a writ of habeas corpus to a federal prisoner on the grounds that the Parole Commission had improperly determined the prisoner's release guidelines. The district court had remanded the prisoner's case to the Commission twice, first for further explanation of the Commission's decision; and the second time for re-categorization of the prisoner's offense severity after the court found the further explanation inadequate. The subject appeal was taken by the Commission, which argued that its reasoning in this case was evident from the record. The Third Circuit rejected the argument, finding that "the Commission failed entirely to provide any useful explanation" for its initial decision. Id. at 936

The Commission's Notice of Action, informing the prisoner of his parole status, contained a statement of reasons (18 U.S.C. sec. 4206(b)), consisting of only a conclusory determination, revealing no chain of reasoning. After exhausting his administrative appeals in an effort to change the severity rating, the prisoner filed a petition for writ of habeas corpus. The United States Magistrate who reviewed the record found no rational basis to support the Commission's action. The district court adopted the Magistrate's report and remanded the case for the Commission to re-examine the case and directed that if the Commission reached the same determination, it should clearly explain its reasoning. Upon remand, the Commission held a new hearing and re-affirmed its prior finding, without pointing to any specific evidence, and without explaining how the record evidence would lead to its conclusion. Instead, it referenced certain information in the pre-sentence report and proceedings in the prisoner's case. The district court reviewed the Commission's determination and again decided that the Commission had failed to adequately explain its conclusion.

As to the district court's first remand order, the Commission made two challenges in the circuit court: 1) the

court's authority to demand any explanation beyond the bare statement supplied in its first Notice of Action; 2) alternatively, such an explanation was not called for because the reasons for its decision could be found in the administrative record. The Circuit Court rejected the first argument "for two reasons, one based on the Commission's due process obligation to follow its own regulations." Id. at 941. In explanation of its first reason for rejecting the Commission's argument, the court said:

> "Where reasoning beyond simple arithmetic or obvious inferences is required to draw conclusions upon which the Commission relies, we see no reason why the formal statement of reasons should not provide the crucial missing logic. Congress has required the Commission to furnish a statement of reasons to the prisoner so that he can receive 'an understandable explanation of his parole status.' . . . In this case, a reasonably intelligent person who was familiar with the relevant facts of the case and who had read the Commission's perfunctory explanation would still not have understood how the Commission reached its conclusion. We do not find it either overly intrusive or contrary to the statute to require the Commission, which is under statutory mandate to 'state with particularity the reasons for [parole] denial,' to truly provide reasons. We believe that a statement of reasons must reveal reasoning, and not simply present conclusions, at least where that reasoning is not apparent from the facts of the case. Id. 839 F.2d at 942.
>
> . . .

As to the Commission's alternative argument that no further explanation was needed in the case, because its reasoning could readily be deduced from the administrative record, the Circuit Court said:

> "We decline to review the record for this evidence, and we affirm the district court's refusal do to so, as well. The statute requires that '[t]he **Commission** shall furnish the eligible prisoner with a **written notice** of

> its determination not later than **twenty-one days**, excluding holidays, after the date of the parole determination proceeding. If parole is denied such notice shall state with particularity the reasons for such denial.' 18 U.S.C. 4206(b) (emphasis added). The statute does not authorize the Commission to develop its reasoning in proceedings before the district court, let alone the court of appeals. The reasons must be furnished in writing, to the prisoner, within twenty-one days of the parole hearing.
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> Moreover, when reviewing an administrative agency's decision, a court is generally not seeking some hypothetical rational support for the agency's action. A court must review the agency's actual on-the-record reasoning process. Only a formal statement of reasons from the agency can provide this explanation, not a **post hoc** rationalization, or agency counsel's in-court reasoning. See, *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 50 (1983). The agency must set forth the basis for its decision 'with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive.' [citation omitted]". Id. 839 F. 2d at 943-44

Marshall makes it clear that where the administrative record does not reveal the reasoning for the Commission's decisions, there is "no reason why the formal statement of reasons should not provide the crucial missing logic." Id. at 942. For, "Congress has required the Commission to furnish such a statement of reasons to the prisoner so that he can receive an 'understandable explanation for his parole status.' " Id. The failure of the Commission to furnish the petitioner here with its reason as to why or how his offense behavior involved murder or was aggravated by the factor of murder was never explained; and despite the obvious statutory and constitutional abridgment nei-

ther of the Courts below took steps to enforce the Commission's obedience to the statement of reasons requirement.

In the district court, and again in the Circuit Court, the Commission's attorney proffered a rationale in its pleadings and brief for the Commission's finding that the petitioner's offense behavior involved murder.[28] The district court remanded the petitioner's case to the Commission, because it "neither complied with the statutory requirements, nor was there a rational basis for its decision." App. 23a. Following the proceedings held on the remand ordered by the district court, the Commission issued a Notice of Action on May 17, 1988 that left unchanged its earlier findings regarding the petitioner's offense severity and the decision denying his parole.[29] The Notice of Action did, however, provide "a summary of the information relied upon." 18 U.S.C. sec. 4206(c). Thereafter, the Court entered judgment denying the petitioner any relief.[30] The court failed to address or correct the absence of a statement in the Notice of Action, of any reasons for the offense severity rating, or for the denial of parole.

Upon consideration of the petitioner's appeal from the District Court judgment, the Circuit Court affirmed the judgment, ruling that "there was no abuse of discretion by the Parole Commission in finding [the petitioner] responsible, although unconvicted, for four murders." 889 F. 2d at 258 The court found "[t]here was sufficient evidence

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[28] Counsel for the Commission argued as a theory of relationship between the murders and the offense of conviction that as a result of the murders, the petitioner had acquired a reputation for ruthlessness and violence, and that it was the reputation gained from the murders which was a part of what induced fear in the victims of the extortion, RICO and Hobbs Act offenses, thereby, in part, facilitating the Commission of those offenses. Respondent's Answer and Return, pp. 00, filed in the District Court; Appellee's Brief on Appeal, pp. 00.

[29] Supra, at p. 00.

[30] Supra, pp. 00-00.

to show that [the petitioner] was feared because of his violent and ruthless nature, thus providing the nexus between the unconvicted murders and his Hobbs Act and RICO offenses." Id.

The petitioner sought rehearing on the appeal on the grounds that the court: 1) failed to enforce the particularity of reasons requirement of 18 U.S.C. sec. 4206(b); and 2) substituted its own discretion for that of the Commission, thus trespassing into the domain which Congress had set aside exclusively for the Commission.

In stating a basis for the finding of nexus between the murders and the petitioner's offense severity, the Circuit Court arrogated unto itself a function that was the primary and sole responsibility of the Commission. The court constituted itself as the authority vested with the power to state the reasons for denial of the petitioner's parole. The court had no such authority. The Congress required the Parole Commission, and only the Commission, "to furnish the eligible prisoner with a written notice of its determination . . . [and] if parole is denied such notice shall state with particularity the reasons for such denial." 18 U.S.C. sec. 4206(b).

Speaking to a similar problem, this court said that "the court cannot substitute its discretion for that of an administrative body," for to do so "is incompatible with the orderly functioning of the process of judicial review." *Burlington Truck Lines, Inc, v. United States*, 371 U.S. 156 at 169 (1962). This, the court said, "is not to deprecate, but to vindicate . . . the administrative process, for the purpose of the rule is to avoid 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.' " Id. (citing *Security and Exchange Commission v. Chenery Corp*, 332 U.S. 194 at 196 (1943).

The reason given by the court for the Commission's decision does not appear in any of the Notices provided by the Commission. The notion expressed in this court-declared reason for the Commission's decision, first ap-

peared in the case through the pleadings and arguments of the Commission's counsel. See, supra n. 28 and text. As to this practice, this court has cautioned: "The Court's may not accept appellate counsel's *post hoc* rationalizations for agency action." *Burlington Truck Lines, Inc. v. United States*, supra, at 372 U.S. 168.

In *Robinson v. United States Board of Parole*, 403 F. Supp. 638 (W.D.N.Y. 1985), a federal prisoner, who was denied parole, claimed in his habeas corpus suit, that the Board erred in categorizing his offense characteristics. The government submitted an affidavit from a senior employee of the Board in which an attempt was made to justify the classification. To this, the court said: "But, since the Board did not provide these reasons to the plaintiff after denying his parole, the court will not allow someone later to hypothesize reasons for the decision after the fact." 403 F. Supp. at 640.

In *Marshall v. Lansing*, supra, the court said: "If parole is denied such notice shall state with particularity the reasons for such denial. 18 U.S.C. sec. 4206(b) The statute does not authorize the Commission to develop its reasoning before the district court, let alone the court of appeals. The reasons must be furnished *in writing, to the prisoner* . . ." 839 F. 2d at 942

Though sec. 4206(b) requires a particularized statement of reasons for the denial of parole, this has not been done in this case.

CONCLUSION

For all the reasons stated above, the petitioner respectfully submits that this Court should grant his petition for writ of certiorari to ensure the review of the important issues raised herein.

Respectfully Submitted,

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COUNSEL FOR PETITIONER

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, TENTH CIRCUIT.

Nov. 6, 1989.

No. 88-2532.

Tino FIUMARA,
Petitioner-Appellant,

v.

Jerry A. O'BRIEN,
Warden, U.S.P. Leavenworth,
Respondent-Appellee.

Rehearing Denied Jan. 25, 1990.

Thomas R. Dyson, Jr., Washington, D.C. (Donald R. Hoffman, of Tilton, Beck & Hoffman, Topeka, Kan., with him on the brief), for petitioner-appellant.

Alleen S. Castellani (Benjamin L. Burgress, Jr. and Connie DeArmond on the brief) of the Office of the U.S. Atty., Topeka, Kan., for respondent-appellee.

Before McKAY and SEYMOUR, Circuit Judges, and PHILLIPS, District Judge.*

PHILLIPS, District Judge.

Appellant Tino Fiumara is an inmate at the United States Penitentiary in Leavenworth, Kansas, where he is serving a sentence of twenty-five (25) years, eight (8) months, and seventeen (17) days arising out of convictions

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* Honorable Layn R. Phillips, United States District Judge for the Western District of Oklahoma, sitting by designation.

he suffered in the United States District Court for the District of New Jersey and the United States District Court for the Southern District of New York. Fiumara was convicted in New Jersey of two violations of the Hobbs Act, involving interference with commerce by threats and violence. Fiumara was convicted in New York of one count of RICO conspiracy, one substantive violation of the RICO statute, two counts of filing false income tax returns, and thirty-five violations of the Hobbs Act.

Prior to Fiumara's sentencing in New Jersey, the government prosecutor properly brought to the attention of the Probation Department Fiumara's alleged involvement in four murders.[1]

The allegations contained in the prosecutor's letter were as follows:

> 1. On or about October 14, 1967, at the 309 Club, located at 309 Lafayette Street, Newark, New Jersey, the defendant Tino Fiumara murdered Peter Mantello also known as "Flatnose Pete", Patsy Collucci and Nicholas Collucci by shooting them to death.
>
> 2. Between on or about January 1, 1969, and March 1969, at the City of Paterson, New Jersey, the defendant Tino Fiumara and others murdered Robert Harris by beating and shooting him.

Fiumara's Appeal Brief at 3, No. 88-2532 (Nov. 11, 1988).

Fiumara has never been charged or tried on these murders. The prosecutor's letter, which was appended to the pre-sentence report, was challenged by Fiumara and an extensive pre-sentencing hearing was held before the district judge in New Jersey.[2] At the conclusion of that hear-

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[1] *See* 18 U.S.C. § 3577 (renumbered 3661, effective Nov. 1, 1986); *Williams v. New York*, 337 U.S. 241, 246, 69 S.Ct. 1079, 1082, 93 L.Ed. 1337 (1949).

[2] *See United States v. Fatico*, 579 F.2d 707 (2nd Cir.1978), *on remand*, 458 F.Supp. 388 (E.D.N.Y.), *aff'd*, 603 F.2d 1053 (2nd Cir.1979), *cert. denied*, 444 U.S. 1073, 100 S.Ct. 1018, 62 L.Ed.2d 755 (1980).

ing the trial judge commented to the effect that: (1) the defendant was not on trial for homicide; (2) the trial court would not sentence the defendant for homicide; and (3) the function of the *Fatico* hearing was not to find the defendant "guilty" or "not guilty" of uncharged murders. (*See* Record on Appeal, Doc. No. 23, Attachment I, *Fatico* Sentencing Transcript, No. 78-319 at 1717 & 1719 (D.C.N.J. Oct. 2, 1979); Fiumara's Appeal Brief at 5 n. 9 & 6 n. 11, No. 88-2532 (Nov. 11, 1988)). The trial court made no findings on Fiumara's involvement in the four murders prior to sentencing.

On June 19, 1984, appellant was afforded his initial parole determination hearing at United States Penitentiary, Leavenworth, Kansas ("USPL"). The Parole Panel stated:

> The Panel takes note of the seriousness of the offense, which has involved extortionate threats and participation in racketeering activity. The Panel also takes note of the allegations concerning the murder of three individuals and the participation in a high level in organized crime activity.
>
> The Panel is of the opinion there is not sufficient information in the file at the present time, to make a finding concerning these allegations. It is the opinion of the Panel, this case should be referred for original jurisdiction consideration so that further information can be requested from the strike force authorities in the New York/New Jersey areas and hopefully further clarification of the overall involvement would be available at that time.

(*See* District Court Record, Doc. No. 8, Ex. 1.)

On August 14, 1984, appellant received a Notice of Action indicating that a rehearing had been scheduled to:

> discuss information contained in transcript from *Fatico* and letter of August 1, 1984, from Special Attorney Stanley R. Chesler and other relevant material available in the USPC/BOP file.

(*See* District Court Record, Doc. No. 8, Ex. 2.)

On December 19, 1984, the United States Parole Commission afforded appellant a special rehearing. At that hearing, the commission stated:

> After consideration of the new information that has been presented by the special attorney [Chesler] as well as the U.S. Attorney in New Jersey, this panel is of the opinion the present offense behavior should be rated as Category Eight severity. The information presented does show that Fiumara was much more involved in organized crime activity which included extortion, racketeering and murder. Information presented indicates that Fiumara was responsible for the murder of 4 persons and that is the basis for the Category Eight recommendation by the panel.

(*See* District Court Record, Doc. No. 8, Ex. 3).

The Panel additionally recommended that the case be referred to the National Commissioners as an original jurisdiction case pursuant to 28 C.F.R. § 2.17(b) (July 1, 1983). (*See* District Court Record, Doc. No. 8, Ex. 3).

Appellant was notified by Notice of Action dated January 14, 1985, that his case had been designated as original jurisdiction and referred to the National Commissioners.

On February 19, 1985, the National Commissioners, after review of appellant's case, issued its Notice of Action ordering that appellant be required to serve the expiration of his sentence. The Commission provided the following reason for its decision:

> Your offense behavior has been rated as Category Eight severity because it involved murder, extortion and racketeering. Your Salient Factor Score is 10. You have been in federal custody a total of 68 monhts [sic]. Guidelines established by the Commission for adult cases which consider the above factors indicate a range of 100+ months to be served before release for cases with good institutional adjustment and program achievement. After review of all relevant factors

> and information presented, a decision above the base of the guidelines is warranted because of the aggravated nature of your offense behavior; *a preponderance of the evidence shows that you were involved in the murder of 4 people. Additionally, you were a principal in an unusually extensive, sophisticated, on-going criminal enterprise controlling and directing the criminal actions of your co-conspirators. By means of extortion, you controlled the New Jersey waterfront. You are also a more serious risk than indicated by your salient factor score as indicated by your long term commitment to a criminal life style.*

(*See* District Court Record, Doc. No. 8, Ex. 7 (emphasis added)).

As permitted by regulation, Fiumara appealed the foregoing decision to the Commission's National Appeals Board.

The National Appeals Board affirmed the Commission's decision by Notice of Action issued October 31, 1985. (*See* District Court Record, Doc. No. 8, Ex. 9).

After appellant's attempts to have the Parole Commission's decision reversed on the administrative level failed, appellant filed a petition for *habeas corpus* relief on March 27, 1987.

On February 29, 1988, the district court remanded the case to the Parole Commission for rehearing because the Commission did not identify any of the evidence relied on for its decision as required by 18 U.S.C. § 4206 and thus did not comply with the statutory requirements. *Fiumara v. O'Brian*, No. 87-3084, slip op. at 8 (D.C. Kan. Feb. 29, 1988) (Record On Appeal, Doc. No. 16). The district court remanded the case to the Parole Commission with directions that a rehearing be held within 30 days.

Upon rehearing, the Parole Commission, in a Notice of Action dated May 17, 1988, stated:

> After review of all relevant factors and information presented, a decision above the guidelines appears

> warranted because your offense includes the following murders. The basis of this finding [sic] are: (1) Sentencing hearing proceedings criminal #78-319, October 2, 1979, U.S. District Court for the District of New Jersey pages 1440-1450; (2) Letter of August 1, 1984, by Stanley R. Chesler, Special Attorney, Organized Crime and Racketeering Section, Newark Strike Force; and (3) Letter of August 3, 1984, by W. Hunt Dumont, U.S. Attorney, District of New Jersey, Newark, New Jersey.

(*See* District Court Record, No. 87-3084-0, Supp. Vols. I & II, Exs. 11, 12, & *in camera* Ex. A; *see also* Order, No. 88-2532 (10th Cir. May 18, 1989) (granting appellant's petition for rehearing and enlarging record on appeal)).

On September 12, 1988, the district court issued a Memorandum And Order denying appellant's petition for writ of *habeas corpus*. The Court stated:

> The court finds no abuse of discretion in the Commission's decision to deny petitioner parole. In categorizing petitioner's offense severity, the Parole Commission considered evidence from three different sources indicating that petitioner had been involved in four murders. The sentencing hearing proceeding, the letter from Special Attorney Stanley R. Chesler, and the letter from U.S. Attorney W. Hunt Dumont all provided corroborating evidence of petitioner's involvement in the murders and *the connection between the murders and the racketeering charge*. (emphasis added).

Fiumara v. O'Brien, No. 87-3084-O, slip op. at 5 (D.C.Kan. Sept. 12, 1988) (Record On Appeal, Doc. No. 27). The district court's decision is presently before this Court on appeal.

On appeal, Fiumara's principal claims are that (1) the Parole Commission improperly used the murders to increase appellant's offense severity rating from Category Five to Category Eight, and (2) the Parole Commission's

determination that Fiumara was responsible for four murders was arbitrary and capricious.

As noted by the district court below, judicial review of Parole Commission determinations is quite limited. The standard is whether the decision is arbitrary and capricious or is an abuse of discretion. *Misasi v. U.S. Parole Comm'n*, 835 F.2d 754, 758 (10th Cir.1987); *Dunn v. U.S. Parole Comm'n*, 818 F.2d 742, 744 (10th Cir.1987); *Dye v. U.S. Parole Comm'n*, 558 F.2d 1376, 1378 (10th Cir.1977); *see generally*, Annotation, *United States Parole Commission Guidelines For Federal Prisoners*. 61 A.L.R. Fed. 135 (1983). Appeal courts may not reweigh evidence, repass on the credibility of reports, or substitute their judgment for that of the Commission. *Dye v. U.S. Parole Comm'n*, 558 F.2d at 1378; *Solomon v. Elsea*, 676 F.2d 282, 290 (7th Cir.1982); *cf. Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511-12, 84 L.Ed.2d 518 (1985) (even at the heightened standard of clearly erroneous, appellate court may not substitute its judgment, or reweigh evidence that is plausible in light of the record in its entirety).

Moreover, the Commission is not limited to the consideration of formally adjudicated crimes, and is entitled to consider information from prosecutors and other parties when making its determinations regarding the release of prisoners. *Christopher v. U.S. Bd. of Parole*, 589 F.2d 924, 932 (7th Cir.1978); 28 C.F.R. § 2.20(d) (July 1, 1983); *see Williams v. New York*, 337 U.S. at 246-47, 69 S.Ct. at 1082-83; *see generally*, Annotation, *Information Considered by United States Parole Commission In Making Determinations Relating To Release On Parole Under § 2 of Parole Commission And Reorganization Act (18 U.S.C.S. §§ 4201 et seq.)*, 58 A.L.R.Fed. 911 (1982). Similarly, the Parole Commission is not bound by the trial judge's decision to not consider evidence of murders when sentencing the defendant. *See Robinson v. Hadden*, 723 F.2d 59, 62-63 (10th Cir.1983), cert. denied, 466 U.S. 906, 104 S.Ct. 1684, 80 L.Ed.2d 159 (1984); *Nunez-Guardado v. Hadden*, 722 F.2d 618, 622 (10th Cir.1983).

We find no abuse of discretion in the Commission's decision to deny Fiumara parole. In reaching its decision to increase Fiumara's offense severity, the Parole Commission considered evidence from three different sources. As noted above, these three sources were pages 1440-50 of the October 2, 1979 sentencing hearing transcript, and the letters from two prosecutors, Stanley R. Chesler and W. Hunt Dumont.

Appellant's argument that the Parole Commission improperly increased his severity rating hinges on his claim that there is no relationship between the four murders and the numerous racketeering and extortion charges of which he stands convicted. Both the Parole Commission and the district court below, however, found such a nexus from a review of the three evidentiary sources. Indeed, after reviewing these materials, the district court specifically cited the "connection" between the murders and the racketeering charges as a basis for denying Fiumara's writ. Similarly, appellant's argument that the Parole Commission erred by finding him responsible for the murders turns on an analysis of the same underlying documents.

After careful review of these documents, our analysis confirms that there was no abuse of discretion by the Parole Commission in finding Tino Fiumara responsible, although unconvicted, for four murders.[3] There was sufficient evidence to show that Fiumara was feared because of his violent and ruthless nature, thus providing the nexus between the unconvicted murders and his Hobbs Act and Rico offenses. The Parole Commission did not abuse its discretion in using the murders to increase Fiumara's of-

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[3] The Panel previously entered an Order and Judgment affirming the district court in this case on April 6, 1989. The Panel noted that the evidentiary documents relied on by the Parole Commission, and then the district court, were not designated in the record and therefore could not be reviewed. On May 18, 1989, the Panel granted appellant's petition for rehearing and ordered the record enlarged to include these materials which we have now reviewed, including evidence that the district court sealed and filed *in camera*. These materials remain sealed and filed *in camera* before this Court.

fense severity rating from Category Five to Category Eight.

In short, appellant has failed to establish that the Parole Commission's decision denying Fiumara parole was arbitrary and capricious or an abuse of discretion. Accordingly, the Parole Commission's decision is affirmed for substantially the same reasons as set forth in the district court's Memorandum And Order of September 12, 1988.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

CIVIL ACTION NO. 87-3084-O

TINO FIUMARA,

Petitioner,

v.

JERRY A. O'BRIEN, Warden,

Respondent.

FILED
U.S. DISTRICT COURT
DISTRICT OF KANSAS

SEP 12 11:20 AM '88

RALPH L. DELOACH,
CLERK

BY /s/ D. Meisener, DEPUTY
AT TOPEKA, KS.

MEMORANDUM AND ORDER

This matter is before the court on respondent's motion to alter or amend judgment. Petitioner has also filed supplementary pleadings requesting the court to grant him parole. The court will address both of these motions.

On March 27, 1987, petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Petitioner raised three grounds of error in his petition: (1) that the United States Parole Commission improperly rated his offense severity as category eight; (2) that the Parole Commission erroneously rendered a parole release decision above the guidelines based upon the same criminal activity

used in determining his offense severity rating; and (3) that the Parole Commission infringed upon his liberty interests by finding him guilty of four murders without substantial information that would meet the preponderance of the evidence standard, thus operating as a bill of attainder.

Having reviewed the petition, the court issued a Memorandum and Order on February 29 1988. In that order, the court remanded the case to the Parole Commission because, in giving petitioner a category eight offense severity rating, the Commission "neither complied with the statutory requirements nor was there a rational basis for its decision." The court denied relief on petitioner's final two grounds of error.

In accordance with the court's order, the Parole Commission held a rehearing on March 29, 1988. At the rehearing, the Commission reaffirmed its earlier findings and gave petitioner a category eight offense severity rating. However, the Commission clarified its earlier decision by listing the evidence it relied upon to determine petitioner's offense severity rating and deny him parole. In pertinent part, the Commission's decision states:

> "After review of all relevant factors and information presented, a decision above the guidelines appears warranted because your offense involved the following aggravating factors: You were involved in four murders. The basis of this finding are: (1) Sentencing hearing proceedings criminal #78-319, October 2, 1979, U.S. District Court for the District of New Jersey, pages 1440-1450; (2) Letter of August 1, 1984 by Stanley R. Chesler, Special Attorney, Organized Crime and Racketeering Section, Newark Strike Force; and (3) Letter of August 3, 1984, by W. Hunt Dumont, U.S. Attorney, District of New Jersey, Newark, New Jersey."

1. *Respondent's motion to alter or amend judgment.*

Respondent makes two arguments in its motion to alter or amend judgment. First, respondent argues that the

Commission does not have to demonstrate "good cause" for denying a prisoner release on parole where the prisoner has a category eight severity rating and no upper parole guidelines. Second, respondent requests the court to clarify its order stating "nor was there a rational basis for its (the Commission's) decision." Specifically, respondent wants to know whether the court determined that the Commission lacked an adequate factual basis for its finding or merely failed to specify the factual basis for its decision.

The Parole Commission must demonstrate "good cause" whenever it denies a prisoner release on parole. Under subsection (c) of 18 U.S.C. § 4206, the Parole Commission may grant or deny release on parole "if it determines that there is good cause for so doing." Nowhere in subsection 4206(c) is there language restricting the application of the "good cause" requirement to only those cases with a lower and upper guidelines. While respondent is correct that "pertinent aggravating case factors" are all that is necessary to render a decision forty-eight months above the base of the guidelines, *See* 28 C.F.R. § 2.20, the court finds that the Commission must meet the "good cause" requirement whenever it denies a prisoner release on parole.

The court remanded the case to the Parole Commission because the Commission failed to specify the factual basis for its decision. As the Memorandum and Order of February 29, 1988, stated: "the Commission in the present case did not even state any of the evidence relied on for its decision." The court did not make a determination that the Commission lacked an adequate factual basis for its decision. Rather, the court found that the Commission failed to state the specific evidence upon which it relied in rendering its decision.

2. *Petitioner's Supplementary Pleadings requesting release*

Since the Parole Commission's rehearing on March 29, 1988, petitioner has filed proposed Findings of Fact and Conclusions of Law requesting that he be released on parole. Petitioner argues that the evidence relied upon by

the Parole Commission does not constitute a sufficient basis for good cause to deny him parole.

Judicial review of Parole Commission determination is extremely limited. The standard for judicial review of Parole Commission decisions has been defined by the Court of Appeals for the Tenth Circuit as "whether the decision is arbitrary and capricious or is an abuse of discretion." *Dye v. United States Parole Commission*, 558 F.2d 1376, 1378 (10th Cir. 1977). Under the "arbitrary and capricious" or "abuse of discretion" standards of review, a district court is not to "repass on the credibility of reports" or other information received by the Parole Commission, *Dye*, 558 F.2d at 1378, and cannot reweigh the evidence or substitute its judgment for that of the Commission. *Hearn v. Nelson*, 496 F.Supp. 1111, 115 (D. Conn. 1980). With these standards in mind, the court will now review the Commission's decision to deny petitioner parole.

The Parole Commission acted within its discretion in considering the evidence of petitioner's involvement in the four murders. When making parole determinations, the Commission "may take into account any substantial information available to it in establishing the prisoner's offense severity rating. . ." 28 C.F.R. § 2.19(c). Recommendations and information from prosecutors and other interested parties are reviewable by the Commission in making such determinations. *See* 28 C.F.R. § 2.20(d). Further, the Commission is not limited to the consideration of formally adjudicated crimes, *See Christopher v. U.S. Board of Parole*, 589 F.2d 924, 932 (7th Cir. 1978), nor are they bound by the district judge's decision not to consider the murder evidence when sentencing petitioner. *See United States v. Addonizio*, 442 U.S. 178 (1979).

The court finds no abuse of discretion in the Commission's decision to deny petitioner parole. In categorizing petitioner's offense severity, the Parole Commission considered evidence from three different sources indicating that petitioner had been involved in four murders. The sentencing hearing proceeding, the letter from Special

Attorney Stanley R. Chesler, and the letter from U.S. Attorney W. Hunt Dumont all provided corroborating evidence of petitioner's involvement in the murders and the connection between the murders and the racketeering charge. Under the U.S. Parole Commission Offense Behavior Severity Index, organized crime offenses such as racketeering are graded according to the underlying offense attempted, and are never assigned less than a category five rating. *See* C.F.R. § 2.20. While reasonable persons may differ as to the rating which petitioner should have received for his offense behavior, the court finds that the Parole Commission did not abuse its discretion or act arbitrarily in reaching its decision.

IT IS THEREFORE ORDERED that respondent's motion to alter or amend judgment be denied.

IT IS FURTHER ORDERED that petitioner's petition for writ of habeas corpus be dismissed and all relief denied. The clerk of the court is directed to transmit a copy of this Memorandum and Order to petitioner and to the office of the United States Attorney's office.

Dated this 12th day of September, 1988, at Kansas City, Kansas.

/s/ Earl E. O'Connor
EARL E. O'CONNOR, Chief Judge

APPENDIX C
UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

CASE NUMBER: 87-3084

TINO FIUMARA,

Petitioner,

v.

JERRY A. O'BRIEN, Warden,

Respondent.

FILED

FEB 29 1988

RALPH L. DeLOACH, Clerk

By /s/ Dee Meissneu Deputy

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that relief be granted to the extent that the case be remanded to the Parole Commission with directions that a rehearing be held within thirty (30) days. In all other respects, the petition is denied.

ENTERED ON THE DOCKET February 29, 1988.

February 29, 1988 — RALPH L. DeLOACH
Clerk

/s/ Dee Meissneu

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

NO. 87-3084

TINO FIUMARA,

Petitioner,

v.

JERRY A. O'BRIEN,

Respondent.

FILED

U.S. DISTRICT COURT
DISTRICT OF KANSAS

FEB 23 '88
BY /s/ L. Seruen DEPUTY
??????? P.G.

MEMORANDUM AND ORDER

This matter is before the court on a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241. Petitioner, an inmate at the United States Penitentiary, Leavenworth, Kansas, raises the following grounds in his petition: (1) that the United States Parole Commission improperly rated petitioner's offense severity as category eight; (2) that the Parole Commission erroneously rendered a parole release decision above the guidelines based upon the same criminal activity used in determining his offense severity rating; and (3) that the Parole Commission infringed upon his liberty interests by finding him guilty of four murders without substantial information that would meet the preponderance of the evidence standard, thus operating as a bill of attainder.

From the record now before the court, we make the following findings of fact and conclusion of law:

Findings of Fact

Petitioner is serving a twenty-year sentence for his conviction in the United States District Court for the District of new Jersey on two counts of interference with commerce by threat or violence. He was subsequently convicted in the United States District Court, Southern District of New York, of unlawfully, willfully and knowingly conducting and participating in racketeering conspiracy; obstruction; delaying and affecting commerce by extortion; requesting, demanding, receiving and accepting payments by union officials; and subscribing to a false income tax return. He was sentenced to serve twenty-five years and six months to run concurrently with his New Jersey sentence of twenty years.

The Parole Commission held an Initial Hearing on June 19, 1984. The Commission made the following findings regarding petitioner's offense rating:

> (a) The prisoner was convicted of interference with commence [sic] by threats or violence and participate [sic] in racketeering.
>
> (b) File material indicates that the offense behavior involved extortion and the control of corrupt activities of Union officials through a position in organized crime. Fiumara had a reputation of being vicious and was feared by those he extorted as well as the ones who worked with him. Further, the information ties Fiumara with organized crime individuals in the New York City/New Jersey area and it is considered that Fiumara was a high ranking official in this organization.
>
> The information indicates that Fiumara controlled the New Jersey waterfront, using extortionate threats and possibly carrying out some of the threats on some of the victim individuals. This fact is not supported in the available information, however.
>
> With regard to the participating in racketeering, the information indicates that Fiumara and the cod-

efendants settled a labor dispute with an individual and an employer through negotiations, in which the employer was to pay $4,800.00 in cash to the previous employee in $300.00 weekly payments. A portion of this money was then to be given to Fiumara and the codefendants, reportedly as payment for their participation in this settlement. The information in the file indicates Fiumara is the most culpable of the defendants in this offense. He was considered the head of the operation and made all of the decisions and was the controlling factor.

Further information is in the file concerning the alledged [sic] activities of Fiumara and the codefendants, but much of this information is not supported and therefore was not considered as a factor in the present Hearing.

(c) Prisoner contests the description of the offense behavior, denying that he made any threats, either physical or indirect and denying that he is an assaultive person. He made no effort to deny his involvement in the extortion for racketeering activities, however.

(d) The Panel rates the offense behavior as category five severity, finding that it involved extortion and participation in racketeering.

(e) The Panel finds the adult guidelines to be applicable.

Petitioner was given a ten point salient factor score, which he does not dispute. The examiner panel recommended the case be referred to the Regional Commissioner and continue petitioner to a presumptive parole date of January 11, 1988. The panel did not find sufficient information to make a finding on the allegations of petitioner's involvement in three murders.

The North Central Region issued a notice of action on August 14, 1984, scheduling a rehearing "to discuss information contained in transcript from 'Fatico' hearing and

letter of August 1, 1984, from Special Attorney Stanley R. Chesler and other relevant material available in the USPC/BOP file."

A rehearing was held on December 19, 1984. Based upon the letters from Special Attorney Stanley R. Chesler dated August 1, 1984, and U.S. Attorney W. Hunt Dumont, the panel decided to raise petitioner's offense severity rating from a category five to a category eight. The panel recommended the case be referred to the Regional Commissioner for original jurisdiction consideration. See 28 C.F.R. § 2.17.

The National Commissioners reviewed petitioner's case and listed the following grounds in support of their decision to rate petitioner as a category eight severity and render a decision above the guidelines:

> Your offense behavior has been rated as Category Eight severity because it involved murder, extortion and racketeering. Your salient factor score is 10. You have been in federal custody a total of 68 months. Guidelines established by the Commission for adult cases which consider the above factors indicate a range of 100+ months to be served before release for cases with good institutional adjustment and program achievement. After review of all relevant factors and information presented, a decision above the base of the guidelines is warranted because of the aggravated nature of your offense behavior: a preponderance of the evidence shows that you were involved in the murder of four people. Additionally, you were a principal in an unusually extensive, sophisticated, ongoing criminal enterprise controlling and directing the criminal actions of your co-conspirators. By means of extortion, you controlled the New Jersey waterfront. You are also a more serious risk than indicated by your salient factor score as indicated by your long term committment [sic] to a criminal life style.

Petitioner filed a notice of appeal with the National Appeals Board, seeking a presumptive release date after service of one-third of his sentence, January 11, 1988. *See* 18 U.S.C. § 4205(a).

Conclusions of Law

"The standard of review of action by the Parole Commission is whether the decision is arbitrary and capricious or is an abuse of discretion." *Dye v. United States Parole Commission*, 558 F.2d 1376, 1378 (10th Cir. 1977). The burden is on petitioner to show that the Commission abused its discretion resulting in an abridgment of petitioner's constitutional rights. *See Billiteri v. United States Board of Parole*, 541 F.2d 938, 943-44 (2d Cir. 1976). Petitioner must demonstrate to the court that the Parole Commission has acted in such a manner as to abuse its broad discretionary powers. Absent a showing of such abuse, petitioner's petition must be denied. *See Loch v. Keohane*, No. 79-1206 (10th Cir., *unpublished*, Nov. 27, 1979).

The Parole Commission must make the following findings before parole may be granted under 18 U.S.C. § 4206:

> (a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances o the offense and the history and characteristics of the prisoner, determines:
>
> (1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and
>
> (2) that release would not jeopardize the public welfare . . . .
>
> . . . .
>
> (c) the Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is

> good cause for so doing: *Provided*, That the prisoner is furnished written notice stating with particularity the reasons for its determination, including a summary of the information relied upon.

In *Nunez-Guardado v. Hadden*, 772 F.2d 618 (10th Cir. 1983), the court discussed the legislative history of section 4206(c):

> For the purposes of this section "good cause" means substantial reason and includes only those grounds put forward by the Commission in good faith and which are not arbitrary, irrational, unreasonable, irrelevant or capricious.
>
> The definition of what constitutes good cause to go outside the established guidelines can not be a precise one, because it must be broad enough to cover many circumstances.
>
> For example, in making a parole release determination above the guidelines, the Commission would consider factors which include whether or not the prisoner was involved in an offense with an unusual degree of sophistication or planning, or has a lengthy prior record, or was part of a large scale conspiracy or continuing criminal enterprise.
>
> 722 F.2d at 623 (quoting H.R. Conf. Rep. No. 94-838, 94th cong., 2d Sess. 27, *reprinted in* [1976] U.S. Code Cong. & Ad. News 335, 351, 359).

Id. at 623

The National Commissioners, in their Notice of Action dated February 19, 1985, stated that "[a]fter review of all relevant factors and information presented, a decision above the base of the guidelines is warranted because of the aggravated nature of your [petitioner's] offense behavior, a preponderance of the evidence shows that you [petitioner] were involved in the murder of four people." The Commissioners went on to state petitioner's extensive

involvement in ongoing criminal activities. Admittedly, the Parole Commission is vested with authority to consider any "available and relevant" information, including crimes for which petitioner was not convicted in determining the appropriate offense severity rating. *See* C.F.R. § 2.19. *See also Nunez-Guardado v. Hadden*, 772 F.2d 618 (1983), but here the Commissioners made *no* reference to the specific evidence relied upon in reaching their decision that under the preponderance of the evidence standard, petitioner had been involved in four murders.

The United States Court of Appeals, Tenth Circuit, addressed a nearly identical issue in *Misasi v. U.S. Parole Commission*, 835 F.2d 754 (10th Cir. 1987). There, the Parole Commission had rendered a decision beyond the parole guidelines because the " 'offense behavior involved the following aggravating factors: It is substantiated by the U.S. Attorney report that [1] subject was the largest illegal distributor of controlled substances in the Western District of Missouri and additionally, [2] subject accepted stolen goods in exchange for controlled substances.' " The court noted that the examiner panel had "other written evidentiary matter before it" in addition to the U.S. Attorney's report, but the Commission decided to rely solely on the report in reaching its decision. *Id.* at 757. The report merely contained a general allegation that Misasi was the largest drug dealer in the Western District of Missouri, and that Misasi had accepted goods which he believed to be stolen in exchange for narcotics. The evidence indicated that none of the goods were stolen. The court held the Commission's decision was based upon a report that was "factually incorrect" and "non-specific." *Id.* at 759. Thus the findings were insufficient to constitute a rational basis for the Commission's decision.

Unlike *Misasi*, the Commission in the present case did not even state any of the evidence relied on for its decision. 18 U.S.C. § 4206 provides that "*specific facts*" must be stated "to distinguish that case from the 'typical' cases for which the guidelines are set." Section 4206 further provides that if the Commission "follows the recommen-

dation of the sentencing judge, the prosecutor or another interested party, it is not sufficient to cite that recommendation as the reason for departure for the guidelines" We conclude that the Parole Commission neither complied with the statutory requirements nor was there a rational basis for its decision.

We will also address briefly the remaining two grounds raised by petitioner. He claims that the Commission can not use the same information to determine his offense severity rating and as "good cause" to render a decision beyond the guidelines. Assuming the Parole Commission had evidence to find petitioner was involved in four murders, the court finds no abuse of discretion by the Commission in then using the same information as aggravating circumstances warranting a decision above the guidelines. Actually, one murder is sufficient to constitute a category eight offense severity rating (28 C.F.R. 2.20, Chpt. Two, Subchpt. A. ¶ 01). Such use is rational and constitutes adequate grounds to exceed the guidelines under 18 U.S.C. § 4206(c).

Finally, petitioner claims that the Commission's finding him guilty of four murders and increasing his length of incarceration operated as a bill of attainder and violated his due process rights. We agree with respondents' argument that a bill of attainder is simply not applicable to parole guidelines which are neither legislative acts nor directed toward an isolated group of persons. *See Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *United States v. Brown*, 381 U.S. 437 (1965).

IT IS THEREFORE BY THE COURT ORDERED that relief be granted to the extent that the case be remanded to the Parole Commission with directions that a rehearing be held within thirty (30) days from the date of this order, all consistent with the views expressed herein. In all other respects, the petition is denied.

IT IS FURTHER ORDERED that the clerk transmit a copy of this Memorandum and Order to counsel for petitioner and to the office of the United States Attorney.

Dated this 29th day of February, 1988, at Kansas City, Kansas.

/s/ Earl E. O'Connor
EARL E. O'CONNOR CHIEF JUDGE

APPENDIX D

U.S. Department of Justice
United States Parole Commission
NOTICE OF ACTION ON APPEAL

NAME FIUMARA, Tino

REGISTER NUMBER 00382-050

INSTITUTION USP, Leavenworth

NATIONAL APPEALS BOARD/FULL COMMISSION: ***The appeal by the above-named has been carefully examined by the National Appeals Board/Full Commission and the following has been ordered:***

Affirmation of the previous decision.

RESPONSE:

In response to your claim that your offense severity is incorrectly rated as Category Eight, this claim is without merit. Your offense behavior has been rated as Category Eight because it involved murder.

In response to your claim that a decision outside the guidelines is not supported by the reasons or facts as stated on the Notice of Action, the factual basis given for the above guideline decision warrants the decision for the reasons stated. The reasons given are specific and comply with 28 C.F.R. 2.20 for decisions outside the guidelines.

In response to your claim that the decision was based on erroneous information, the evidence you have presented does not persuade the Commission that the information relied upon is inaccurate.

In response to your claim that the Commission did not follow correct procedures in deciding your case, the record indicates the contrary.

All relevant factors have been considered and no new or significant information is presented which would justify a more lenient decision.

All decisions by the National Appeals Board/Full Commission on appeal are final.

(Date of Notice)
July 14, 1988

(Full Commission)

(Docket Clerk)
jj

APPENDIX E

U.S. Department of Justice
United States Parole Commission
NOTICE OF ACTION

Name FIUMARA, Tino

Register Number 00382-050

Institution USP, Leavenworth

In the case of the above-named parole action was ordered:

No change in continuance to expiration.

REASONS:

Retroactivity does not apply. Neither your recalculated severity rating (old category eight; new category eight) nor your recalculated salient factor score risk category (old category very good; old score 10; new category very good; new score 10) is more favorable. You have been in federal confinement as a result of your behavior for a total of 118 months. Guidelines established by the Commission indicate a range of 100+ months to be served for cases with a good institutional adjustment and program achievement. After review of all relevant factors and information presented, a decision above the guidelines appears warranted because your offense involved the following aggravating factors: You were involved with four murders. The basis for this finding are: (1) Sentencing hearing proceedings criminal #78-319, October 2, 1979, U.S. District Court for the District of New Jersey, pages 1440-1450; (2) Letter of August 1, 1984 by Stanley R. Chesler, Special Attorney, Organized Crime and Racketeering Section, Newark Strike Force; and (3) Letter of August 3, 1984 by W. Hunt Dumont, U.S. Attorney, District of New Jersey, Newark, New Jersey. Additionally, you were a principal in an unusually extensive, sophisticated, ongoing criminal enterprise controlling and directing the criminal actions of your co-conspirators. By means of extortion, you controlled the New Jersey waterfront. You are a more serious risk than in-

dicated by your salient factor score as indicated by your long term commitment to a criminal life style.

As required by law, you have also been scheduled for a statutory interim hearing during March 1990.

Appeals Procedure:

The above is an original jurisdiction decision, and is appealable to the Commission under 28 C.F.R. 2.27;

(Date of Notice)
May 17, 1988

(National Commissioners)

(Docket Clerk)
jj

Commission

O.J. REFERRAL

APPENDIX F

U.S. Department of Justice
United States Parole Commission
NOTICE OF ACTION

Name FIUMARA, Tino

Register Number 00382-050

Institution Leavenworth

In the case of the above-named the following parole action was ordered:

Continue to Expiration

A presumptive parole date is conditioned upon your maintaining good institutional conduct and the development of a suitable release plan. Prior to release your case will be subject to review to ascertain that these conditions have been fulfilled. For an explanation of special conditions of release, see the reverse side of this form.

REASONS

Your offense behavior has been rated as Category Eight severity because it involved murder, extortion and racketeering. Your salient factor score is 10. You have been in federal custody a total of 68 months. Guidelines established by the Commission of adult cases which consider the above factors indicate a range of 100+ months to be served before release for cases with good institutional adjustment and program achievement. After review of all relevant factors and information presented, a decision above the base of the guidelines is warranted because of the aggravated nature of your offense behavior: a preponderance of the evidence shows that you were involved in the murder of four people. Additionally, you were a principal in an unusually extensive, sophisticated, ongoing criminal enterprise controlling and directing the criminal actions of your co-conspirators. By means of extortion,

your controlled the New Jersey waterfront. You are also a more serious risk than indicated by your salient factor score as indicated by your long term committment to a criminal life style.

As required by law, you have also been scheduled for a statutory interim hearing during the docket immediately preceding completion of your minimum term (1/11/88).

(Date)
February 19, 1985

(Region) (NAB) (Nat. Comm.)
National Commissioners O.J. Referral

(Docket Clerk)
br

APPENDIX G

U.S. Department of Justice
United States Parole Commission
NOTICE OF ACTION

Name FIUMARA, Tino

Register Number 00382-050

Institute Leavenworth

In the case of the above-named the following parole action was ordered:

Schedule for a rehearing on next available docket via 28 C.F.R. 2.24 (b)(3).

A presumptive parole date is conditioned upon your maintaining good institutional conduct and the development of a suitable release plan. Prior to release your case will be subject to review to ascertain that these conditions have been fulfilled. For an explanation of special conditions of release, see the reverse side of this form.

(Reasons/Conditions)

To discuss information contained in transcript from 'Fatico' hearing and letter of August 1, 1984 from Special Attorney Stanley R. Chesler and other relevant material available in the USPC/BOP file.

(Date)
August 14, 1984

(Region) (NAB) (Nat. Comm.)
North Central

(Docket Clerk)
/s/ L. Jackson

U.S. Department of Justice
U.S. Parole Commission

ORDER

Name FIUMARA, Tino

Register Number 00382-050

Institution Leavenworth

In the case of the above-named, the Commission has carefully examined all the information at its disposal and the following action with regard to parole, parole status, or mandatory release status is hereby ordered:

Reschedule for rehearing on next available docket via 28 C.F.R. section 2.24(b)(3) to discuss information contained in transcript from 'Fatico' hearing and letter of 8-1-84 from special atty. Stanley R. Chesler and any other relevant material available in the USPC/BOP file.

/s/ Carol M. Pavilock
8/13/84

28 CFR 2.28(a)

14 AUG 1984	*NORTH CENTRAL REGION*
(Date Notice sent)	*(Region-specify)*

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 88-2532

TINO FIUMARA, Prison Number 00382-050,
Petitioner - Appellant,

v.

JERRY A. O'BRIEN,
Warden, U.S.P. Leavenworth,
Respondent - Appellee.

ORDER

Filed January 25, 1990

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges, and PHILLIPS,* District Judge.

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*The Honorable Layn R. Phillips, District Judge, of the United States District Court for the Western District of Oklahoma, sitting by designation.

Appellant's petition for rehearing is denied by the panel of judges who decided the appeal on the merits. The panel judges also deny the motion of the National Association of Criminal Defense Lawyers for leave to file a brief amicus curiae.

Pursuant to Fed. R. App. P. 35(b) the petitioners for rehearing en banc were transmitted to all panel members

and all judges of the court in regular active service. No member of the hearing panel and no judge in regular active service having requested that the court be polled on rehearing en banc, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER,
Clerk

By /s/ Patrick Fisher

APPENDIX I

STATUTES, REGULATIONS AND RULES

Statutes, United States Code Provisions

1. 5 U.S.C. Sec. 556(d) (Administrative Procedure Act):

> "Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence."

2. 18 U.S.C. Secs. 4201, *et seq.* (Parole Commission & Re-Organization Act of 1976), Pub. L. No. 94-233, 90 Stat 219-231 (1976):

§ 4205. Time of eligibility for release on parole

(a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serving ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

§ 4206. Parole determination criteria

(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

> **(1)** that release would not depreciate the seriousness of his offense or promote disrespect for the law; and
>
> **(2)** that release would not jeopardize the public welfare;

subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

(b) The Commission shall furnish the eligible prisoner with a written notice of its determination not later than twenty-one days, excluding holidays, after the date of the parole determination proceeding. If parole is denied such notice shall state with particularity the reasons for such denial.

(c) The Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing: *Provided*, That the prisoner is furnished written notice stating with particularity the reasons for its determination, including a summary of the information relied upon.

(d) Any prisoner, serving a sentence of five years or longer, who is not earlier released under this section or any other applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term or terms of more than forty-five years including any life term, whichever is earlier: *Provided, however*, That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime.

(Added Pub.L. 94-233, § 2, Mar. 15, 1976, 90 Stat. 223.)

§ 4207. Information considered

In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:

(1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;

(2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

(3) presentence investigation reports;

(4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge;

(5)[1] a statement, which may be presented orally or otherwise, by any victim of the offense for which the prisoner is imprisoned about the financial, social, psychological, and emotional harm done to, or loss suffered by such victim; and

(5)[1] reports of physical, mental, or psychiatric examination of the offender.

There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available.

(Added Pub.L. 94-233, § 2, Mar. 15, 1976, 90 Stat. 224, and amended Pub.L. 98-473, Title II, § 1408(a), Oct. 12, 1984, 98 Stat. 2177.)

28 CODE OF FEDERAL REGULATIONS (C.F.R.)
(7-1-85 Edition)

1. 2.12

2.12 Initial hearings: Setting presumptive release dates.

(a) An initial hearing shall be conducted within 120 days of a prisoner's arrival at a Federal institution or as soon thereafter as practicable; except that in the case of a prisoner with a minimum term of parole ineligibility of ten years or more, the initial hearing shall be conducted at least 90 days prior to the completion of such minimum term, or as soon thereafter as practicable.

---

[1] So in original. Two paragraphs (5) have been enacted.

(b) Following initial hearing, the Commission shall (1) set a presumptive release date (either by parole or by mandatory release) within fifteen years of the hearing; (2) set an effective date of parole; or (3) continue the prisoner to a fifteen year reconsideration hearing pursuant to § 2.14(c).

(c) Notwithstanding the above paragraph, a prisoner may not be paroled earlier than the completion of any judicially set minimum term of imprisonment or other period of parole ineligibility fixed by law.

(d) A presumptive parole date shall be contingent upon an affirmative finding by the Commission that the prisoner has a continued record of good conduct and a suitable release plan and shall be subject to the provisions of §§ 2.14 and 2.28. In the case of a prisoner sentenced under the Narcotic Addict Rehabilitation Act, 8 U.S.C. 4254, a presumptive parole date shall also be contingent upon certification by the Surgeon General pursuant to § 2.3 of these rules. Consideration of disciplinary infractions in cases with presumptive parole dates may be deferred until the commencement of the next in-person hearing or the pre-release record review required by § 2.14(b). While prisoners are encouraged to earn the restoration of forfeited or withheld good time, the Commission will consider the prisoner's overall institutional record in determining whether the conditions of a presumptive parole date have been satisfied.

[42 FR 39809, aug. 5, 1977, as amended at 44 FR 3405, 3407, Jan. 16, 1979; 48 FR 22919, May 23, 1983; 49 FR 34208, Aug. 29, 1984]

2. 2.19

§ 2.19 Information considered.

(a) In making a parole or reparole determination the Commission shall consider, if available and relevant:

(1) Reports and recommendations which the staff of the facility in which such prisoner is confined may make;

(2) Official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

(3) Pre-sentence investigation reports;

(4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge and prosecuting attorney;

(5) reports of physical, mental, or psychiatric examination of the offender; and

(6) a statement, which may be presented orally or otherwise, by any victim of the offense for which the prisoner is imprisoned about the financial, social, psychological, and emotional harm done to, or loss suffered by such victim.

(b) There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available (18 U.S.C. 4207). The Commission encourages the submission of relevant information concerning an eligible prisoner by interested persons.

(c) The Commission may take into account any substantial information available to it in establishing the prisoner's offense severity rating, salient factor score, and any aggravating or mitigating circumstances, provided the prisoner is apprised of the information and afforded an opportunity to respond. If the prisoner disputes the accuracy of the information presented, the Commission shall resolve such dispute by the preponderance of the evidence standard; that is, the Commission shall rely upon such information only to the extent that it represents the explanation of the facts that best accords with reason and probability. However, the Commission shall not consider in any determination, charges upon which a prisoner was found not guilty after trial unless:

(1) Reliable evidence is presented that was not introduced at trial (e.g., a subsequent admission or other clear indication of guilt); or

(2) The prisoner was found not guilty by reason of his mental condition.

(d) Recommendations and information from sentencing judges, defense attorneys, prosecutors, and other inter-

ested parties are welcomed by the Commission. In evaluating a recommendation concerning parole, the Commission must consider the degree to which such recommendation provides the Commission with specific facts and reasoning relevant to the statutory criteria for parole (18 U.S.C. 4206) and the application of the Commission's guidelines (including reasons for departure therefrom). Thus, to be most helpful, a recommendation should state its underlying factual basis and reasoning. However, no recommendation (including a prosecutorial recommendation pursuant to a plea agreement) may be considered as binding upon the Commission's discretionary authority to grant or deny parole.

[42 FR 39809, Aug. 5, 1977, as amended at 44 FR 26550, May 4, 1979; 44 FR 27658, May 11, 1989; 44 FR 31638, June 1, 1979; 49 FR 34207, Aug. 29, 1984; 49 FR 44098, Nov. 2, 1984]

3. 2.20

§ 2.20 Paroling policy guidelines: Statement of general policy.

(a) To establish a national paroling policy, promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration, the United States Parole Commission has adopted guidelines for parole release consideration.

(b) These guidelines indicate the customary range of time to be served before release for various combinations of offense (severity) and offender (parole prognosis) characteristics. The time ranges specified by the guidelines are established specifically for cases with good institutional adjustment and program progress.

(c) These time ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered.

(d) The guidelines contain instructions for the rating of certain offense behaviors. However, especially mitigating

or aggravating circumstances in a particular case may justify a decision or a severity rating different from that listed.

(e) An evaluation sheet containing a "salient factor score" serves as an aid in determining the parole prognosis (potential risk of parole violation). However, where circumstances warrant, clinical evaluation of risk may override this predictive aid.

(f) Guidelines for reparole consideration are set forth at § 2.21.

(g) The Commission shall review the guidelines, including the salient factor score, periodically and may revise or modify them at any time as deemed appropriate.

(h)(1) The Adult Guidelines shall apply to all offenders except as specified in paragraph (2) of this section.

(2) The Youth/NARA Guidelines will apply to any offender sentenced under the Youth Corrections Act, the Narcotic Rehabilitation Act, or the Juvenile Justice Act, and to any other offender who was less than 22 years of age at the time the current offense was committed, regardless of sentence type. If an offender was less than 18 years of age at the time of the current offense, such youthfulness shall, in itself, be considered as a mitigating factor.

(i) For criminal behavior committed while in confinement see § 2.36 (Rescission Guidelines).

(j)(1) In probation revocation cases, the original federal offense behavior and any new criminal conduct on probation (federal or otherwise) is considered in assessing offense severity. Credit is given towards the guidelines for any time spent in confinement on any offense considered in assessing offense severity. Where there is new criminal conduct on probation, the original federal conviction is also counted in the salient factor score.

(2) Exception: where probation has been revoked on a complex sentence [i.e., a committed sentence of more than six months followed by a probation term], the case shall

be considered for guidelines purposes under § 2.21 as if parole rather than probation had been revoked.

UNITED STATES PAROLE COMMISSION, RULES AND PROCEDURES MANUAL (NOVEMBER 4, 1985)

1. Sec. 2.20-04

2.20-04. *Offense Severity Rating.* In applying the guidelines, the offense severity rating shall reflect the overall circumstances of the present offense behavior. Select the offense rating appropriate to the actual offense behavior that occurred. The severity rating must be explained on the Notice of Action Worksheet (in the space provided) by a brief summary of the specific facts that justified the rating. 28 C.F.R. 2.19(c) provides: "The Commission may take into account any substantial information available to it in establishing the prisoner's offense severity rating, salient factor score, and any aggravating or mitigating circumstances, provided the prisoner is apprised of the information and afforded an opportunity to respond. If the prisoner disputes the accuracy of the information presented, the Commission shall resolve such dispute by the preponderance of the evidence standard; that is, the Commission shall rely upon such information only to the extent that it represents the explanation of the facts that best accords with reason and probability. However, the Commission shall not consider in any determination, charges upon which aprisoner was found not guilty after trial unless reliable information is presented that was not introduced into evidence at such trial (e.g., a subsequent admission or other clear indication of guilt)."

Information in the file describing offense circumstances more severe than reflected by the offense of conviction (for example, information contained in a count of an indictment that was dismissed as a result of a plea agreement) may be relied upon to select an appropriately higher severity rating only if such information meets the standard indicated in 28 C.F.R. 2.19(c). The normal indicants of reliability are (a) the report is specific as to the behavior alleged to have taken pace; (b) the allegation is corrobo-

rated by established facts; and (c) the source of the allegation appears credible. The prisoner is to be informed of the allegation at the hearing and given an opportunity to respond. An allegation that is vague, unsupported, or comes from an unreliable source should not be considered. Cases requiring further information or verification may be referred to the Regional Office.

The Commission's consideration of aggravating offense circumstances in applying its guidelines has been approved in the following cases: *Zannino* v. *Arnold*, 531 F.2d 687 (3d Cir. 1976) [allegation that offense was a "large-scale conspiracy" committed in an "unusally sophisticated" manner]; *Brown* v. *Lundgren*, 528 F.2d 1050 (5th Cir. 1976) [circumstances not given in the opinion but involved pattern of ongoing criminal behavior and multiple separate offenses[; *Grattan* v. *Sigler*, 525 F.2d 329 (9th Cir. 1975) [allegation that the prisoner was a "ringleader"]; *Foddrell* v. *Sigler*, 418 F.Supp. 324 (M.D. Pa. 1976) ["sophisticated operation involving large amounts of herion"]; and *Biancone* v. *Norton*, 421 F.Supp. 1044 (D. Conn. 1976) [multiple separate offenses]; and in the cases cited below. Similarly, Commission's consideration of unadjudicated offenses has been approved in the following cases: *Billiteri* v. *United States Board of Parole*, 541 F.2d 938 (2d Cir. 1976) [offense rated as extortion based on information in the presentence report; the Court specifically rejected the contention that the Government's acceptance of a plea restricted to the conspiracy charge was a bar to the Commission from considering the actual offense behavior]; *Bistram* v. *U.S. Parole Board*, 535 F.2d 329 (5th Cir. 1976) [Commission relied upon dismissed count of kidnapping notwithstanding bargained plea to bank robbery only]; *Lupo* v. *Norton*, 371 F.Supp. 156 (D. Conn. 1974) [prisoner convicted of conspiracy to transport stolen goods was alleged to have committed robbery to obtain same]; and *Manos* v. *U.S. Board of Parole*, 399 F.Supp. 1103 (M.D. Pa. 1975). [Prisoner pleaded guilty to two counts of filing false tax reports involving less than $20,000 but Commission considered entire 22-count indictment charging a total de-

frauding of $150,000]. These decisions have accorded to the Parole Commission the same scope of discretion as that exercised by the sentencing courts. As stated in *Billiteri, supra*, at 444:

> "If therefore, the sentencing judge is not limited to a consideration of only that criminal conduct of the defendant that is related to the offense for which he was convicted, the Parole Board, which is concerned with all facets of a prisoner's character, make-up and behavior, is *a fortiori*, certainly entitled to be fully advised of the contents of the presentence report and to use it in giving an offense severity rating and for such other purposes as it finds necessary and proper. . ."